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CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., WBNS TV INC. AND RADIOHIO INCORPORATED,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners National Association of Broadcasters, National Broadcasting Company, Inc., WBNS TV Inc., and RadiOhio Incorporated * respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on June 29, 1979.

OPINIONS BELOW

The opinion of the court of appeals (FCC App. 1a)[1] has not yet been reported. Its judgment appears as FCC App. 57a. The opinion of the Federal Com-

* All petitioners were intervenors in the court of appeals. In addition to WNCN Listeners Guild, Respondents include Citizens Communications Center, Classical Radio for Connecticut, Inc., Committee for Community Access, and United Church of Christ.

[1] The Federal Communications Commission and the United States of America have petitioned for a writ of certiorari to review the

munications Commission (FCC App. 117a) is reported at 60 F.C.C.2d 858 (1976). Its decision denying reconsideration (FCC App. 176a) is reported at 66 F.C.C.2d 78 (1977).

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. On September 21, 1979, the time for filing this petition was extended to November 26, 1979 in an Order signed by Mr. Chief Justice Burger. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals improperly abridged the discretion of the Federal Communications Commission concerning the achievement of diversity in radio programming, by insisting that the FCC regulate certain proposed changes in the artistic and journalistic formats of radio broadcast stations.

   (a) Whether the Communications Act of 1934 requires the FCC to regulate such program format changes.

   (b) Whether the FCC's decision to leave the selection of program formats to marketplace forces was reasonable and within its discretion.

2. Whether the First Amendment to the Constitution and Section 326 of the Communications Act prohibit government dictation of artistic and journalistic radio formats as mandated by the court of appeals.

decision involved in this petition. The opinions of the Commission and the court of appeals are included in the Appendix to the government's petition and will be cited herein as "FCC App."

STATUTES INVOLVED

Sections 303, 308, 310, and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 303, 308, 310, and 326. These statutes appear as an appendix to this petition.

STATEMENT OF THE CASE

This case involves a reviewing court's mandate—over the administrative agency's strong objection—requiring government prescription and prohibition of radio programming.

Following public notice and written comments by interested parties, the Federal Communications Commission adopted a statement of policy explaining its judgment that it should not regulate program format changes by radio broadcast stations.[2] In its statement, the FCC reconsidered and rejected a policy which it had once accepted at the appellate court's instigation[3] after almost 40 years without such regulation.

[2] Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations, 57 F.C.C.2d 580 (1976) ("Notice of Inquiry"); FCC App. 60a, 60 F.C.C.2d 858 (*"Policy Statement"*) FCC App. 117a, *recon denied,* 66 F.C.C.2d 78 (1977), FCC App. 176a.

A radio station's program format is the comprehensive pattern of material it broadcasts. It usually emphasizes one or more types of music, and the music is intermixed with varying amounts and styles of verbal continuity and non-entertainment programming, e.g., news and public affairs. Some stations broadcast all-news, religious, foreign language, ethnic, or "talk" programs, instead of music, as their format choice. Thus, contrary to the title of the FCC proceedings, this case involves more than entertainment programming.

[3] *See* Citizens Committee to Keep Progressive Rock v. FCC, 478 F.2d 926 (D.C. Cir. 1973); Lakewood Broadcasting Service, Inc.

The court's policy required an evidentiary hearing on any format change proposed by . . . applicant for assignment or transfer of control of a radio broadcast license, if such change would mean the loss of a "unique" format in that radio market, if a substantial amount of public protest occurred, and if the station could not establish that it was losing money as a direct result of the present format.

The FCC's Notice of Inquiry commencing this proceeding was prompted by the appellate court's reversal in the *WEFM* case[4] of an adjudicatory decision in which the FCC had granted a license assignment application without an evidentiary hearing. In that earlier case the court of appeals had not only disagreed with the Commission's application of the "unique"-format policy to the facts of that case,[5] but also had criticized the Commission majority's stated willingness to leave broadcasters' format choices to competition in the radio marketplace except in extreme situations. Without any record or briefing on the underlying statutory question, the court of appeals had declared that the Communications Act's "public interest" standard and its mandate to the FCC to "generally encourage the larger and more effective use of radio in the public interest"[6] compelled the Commission to forcefully ap-

v. FCC, 478 F.2d 919 (D.C. Cir. 1973); Hartford Communications Committee v. FCC, 467 F.2d 408 (D.C. Cir. 1972); Citizens Committee to Preserve the Voice of the Arts in Atlanta v. FCC, 436 F.2d 263 (D.C. Cir. 1970).

[4] Citizens Committee to Save WEFM v. FCC, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*).

[5] *Id.* at 264-65.

[6] *Id.* at 267, citing 47 U.S.C. § 303(g).

ply the "unique"-format policy developed by the court in order "to secure the maximum benefits of radio to all the people of the United States."[7] The court had opined that there is "no longer any room for doubt that, if the FCC is to pursue the public interest, it may not at the same time be able to pursue a policy of free competition" in program format selection by radio licensees.[8] The Commission's subsequent Notice of Inquiry questioned these conclusions and asked for comment on a number of factual and legal issues suggested by the court's dicta.

The FCC decided that it should adopt a different policy, after considering 50 sets of written comments and reply comments including substantial exhibits of economic studies and other data from parties with conflicting viewpoints and from its own staff.[9] The Commission concluded that the regulation of programming required by the court in *WEFM* was inconsistent with the policy Congress had adopted for broadcasting in the Communications Act, presented insoluble problems in application and, in the absence of more extensive government control over program content, was unlikely to provide any significant increase in the substantial diversity provided by the marketplace. 60 F.C.C.2d at 865, FCC App. 129a-30a.

The Commission's conclusions in the *Policy Statement* were based partly on its understanding of the continuing force of the interpretation of the Communi-

[7] *Id.* (emphasis deleted), *quoting* National Broadcasting Co. v. United States, 319 U.S. 190, 217 (1943).

[8] *Id.*

[9] *See Policy Statement*, Appendices A & B, 60 F.C.C.2d 858, 866, FCC App. 117a, 135a.

cations Act by the Supreme Court in *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), that "the Act recognizes that the field of broadcasting is one of free competition." 60 F.C.C.2d at 860, FCC App. 122a. The implication of this view of the Act for regulation of program formats was clear to the Commission: "broadcasters are to compete with one another, and they must necessarily do so in the domain of program formats, because there is virtually no other form that competition among broadcasters can take." 60 F.C.C.2d at 860, FCC App. 123a.

The Commission found that market forces had provided a significant, even if not perfect, amount of diversity. 60 F.C.C.2d at 863, FCC App. 128a-29a. Moreover, only market forces could reflect the element of intensity of demand for different formats, allowing for diversity *within* format types as well as *among* them. *Id.* The Commission observed that "allocating entertainment formats by market forces has a precious element of flexibility which no system of regulatory supervision could possibly approximate." 60 F.C.C.2d at 864, FCC App. 131a.

The Commission also found that format regulation would present a vexing and basically insoluble problem of identifying and defining individual formats. The Commission pointed to the acute difficulties presented where "progressive rock" formats must be distinguished from other types of "rock", and where emphasis on 19th century classical music might have to be distinguished from a format including more 20th century classical music. The Commission found that this "elusiveness" in format definition had serious practical consequences in making it "impossible for a broadcaster to know prospectively what sort of entertainment

programming the public interest standard requires it to present" and plaguing as well, the Commission's "review of the licensee's discretion." 60 F.C.C.2d at 862, FCC App. 127a.

The Commission also concluded that regulation of entertainment formats had constitutional dimensions in at least two important respects. First, the threat of a hearing that might accompany an effort by a licensee to modify a format would, in the Commission's view, make the risk "of undertaking innovative or novel programming altogether unacceptable." 60 F.C.C.2d at 865, FCC App. 132a-33a. The Commission found that this common carrier-like "obligation to continue service . . . deprives the public of the best efforts of the broadcast industry and results in an inhibition of constitutionally protected forms of communication with no offsetting justifications . . . ." *Id.* Secondly, implementation of format regulation would necessarily result in the Commission's "entanglement in matters that Congress meant to leave to private discretion," and would raise serious constitutional questions "because 'a comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed.' " 60 F.C.C.2d at 865, FCC App. 134a, *quoting Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971).

Finally, based on its "further study" of the Commission's appropriate role in format regulation, its experience in attempting to comply with the mandates of the court of appeals in *WEFM* and earlier adjudicatory proceedings, and on the comments submitted in this proceeding, the Commission concluded "that the market is the allocation mechanism of preference for entertainment formats, and that Commission super-

vision in this area will not be conducive to producing either program diversity or satisfied radio listeners." 60 F.C.C.2d at 866 n.8, FCC App. 134a.

In denying subsequent petitions for reconsideration of the *Policy Statement*, the Commission adhered to its reasons for not interfering in radio program format selections and distinguished other forms of program regulation by the FCC. *Entertainment Formats* (Reconsideration), 66 F.C.C.2d 78 (1977), FCC App. 176a.

Several parties to the FCC proceeding invoked the jurisdiction of the court of appeals pursuant to 28 U.S.C. § 2342. The court of appeals, in the *en banc* decision of which review is here sought, held that the FCC *Policy Statement* is "unavailing and of no force and effect." Slip op. at 42, FCC App. 40a. Two judges (Tamm and MacKinnon, JJ.) dissented and a third judge (Bazelon, J.), while concurring in vacating the FCC decision on a procedural ground upon which the majority did not rest, indicated that on the merits he would uphold the Commission's policy judgment.

Judge McGowan, writing for the majority, reaffirmed *WEFM* and extended to license-renewal applications also (slip op. at 22, FCC App. 20a) the court's interpretation of the Communications Act that required an FCC evidentiary hearing on certain format change proposals made by license transfer applicants. The court of appeals was critical of the FCC for having challenged the court's statutory interpretation, and denied that the court was making policy for the Commission. While conceding that the FCC could rightfully attempt to demonstrate that incorrect factual premises underlay the court's findings about the marketplace

and that "an agency is better equipped to develop legislative-type facts than is this court" (slip op. at 36, FCC App. 34a), the court nevertheless disagreed with the economic and other factual premises of the Commission and engaged in its own analysis to determine whether competition among radio stations would provide program diversity as well or better than government regulation.

The court also found no merit in the Commission's concern about the administrative burden of the court's directive and otherwise defended its substantive and procedural directions as workable for broadcasters and the regulatory agency, even though (or particularly because) broadcasters often felt compelled to settle with protesting citizen groups rather than be delayed and burdened with a long hearing. Generally, the court accused the Commission of exaggerating the intrusiveness of the court's position, while at the same time criticizing the Commission for failing to take affirmative steps to minimize the intrusive features of *WEFM* and other format decisions (slip op. at 29, FCC App. 27a).

As its initial point and elsewhere in its opinion, the court of appeals faulted the Commission for not providing opportunity to the public to comment in advance upon a staff-prepared table, compiled largely from published trade materials, which set out the numbers of radio stations in 18 categories of formats in the largest metropolitan markets of the United States (Appendix B to the *Policy Statement*, 60 F.C.C. 2d at 872-81, FCC App. 156a-70a). The court specifically declined to reject the *Policy Statement* on this ground (slip op. at 19 n.24, FCC App. 17a) and stated

that it could not be persuaded to accept the Commission's policy "even if we were to accept the study on its own terms" (slip op. at 37, FCC App. 35a).

In a concurring opinion, Judge Bazelon explained his vote entirely on the non-dispositive procedural point just mentioned. Beyond that, "because the majority has precluded the Commission from adopting a rule contrary to *WEFM*," he felt compelled to note his agreement with much of the dissenting opinion regarding the Commission's policymaking discretion under the public interest standard, especially considering the Supreme Court's reversal of the court of appeals' decision in *National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977), *rev'd*, 436 U.S. 775 (1978). Judge Bazelon said that "the majority virtually confines the FCC to a spectator's role . . . ," (opinion of Bazelon, J. at 1-2, FCC App. 41a-42a) and "fails to grapple seriously with the constitutional implications of its decision." (Opinion of Bazelon, J. at 2, FCC App. 42a.)

Judge Tamm, joined by Judge MacKinnon, wrote a dissenting opinion, charging that the majority's decision "usurps the proper role of the Federal Communications Commission . . . in the formulation of communications policy." (Opinion of Tamm, J. at 1, FCC App. 46a.) These judges, who found the majority's economic analysis flawed, thought the Commission's determinations were reasoned and not arbitrary or capricious and therefore should be affirmed without the necessity of reaching the "substantial" First Amendment concerns stated by the Commission (opinion of Tamm, J. at 3 n.8, FCC App. 48a). The dissenters faulted the majority for not deferring to the Commission's assessment of market conditions and concluded

that the court's decision "violates the mandate of *FCC* v. *National Citizens Committee for Broadcasting.*" (Opinion of Tamm, J. at 11, FCC App. 56a.)

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals conflicts with this Court's interpretation of the Communications Act of 1934 in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940), and presents important federal questions which should be decided by this Court. The court of appeals usurped the policymaking role of the Federal Communications Commission and violated the constitutional and statutory scheme prohibiting censorship and encouraging free competition in radio programming.

The Commission has never asserted, and no other court has ever suggested, the existence of such sweeping power to control the subject matter of radio programs. The First Amendment to the Constitution and Section 326 of the Communications Act [10] prohibit such censorship; there is nothing in the Act that commands it, and the Commission acted well within its discretion in deciding that the public interest is better served by the licensees' selection of program formats under the discipline of strong competition in the radio marketplace.

I.

The court of appeals dictated a policy for the FCC to follow in acting upon renewal applications and transfer applications filed by radio broadcast stations. The court

[10] Communications Act of 1934, as amended, Section 326, 47 U.S.C. § 326. The provisions of the Act cited herein are set forth in the Appendix to this petition.

did this entirely on the basis of its own findings concerning the operation of the radio market. The policy is important because it applies in every case in which an applicant proposes to change a "unique" program format (or, if the Commission prefers, in every case in which there is "significant" listener protest to the change of any format). The court, however, denied that it was making policy and claimed instead that it was reaffirming the "law" it had expounded in *Citizens Committee to Save WEFM* v. *FCC*,[11] a limited-party adjudicatory case that prompted the Commission to initiate this public inquiry proceeding.

As explained hereinafter, the court of appeals was clearly wrong in its understanding of what the Communications Act required in this respect; the Act does not require this kind of overall program regulation. To the contrary, legislative history and the decisions of this Court support if not require the Commission's policy judgment *not* to regulate to this extent. It therefore follows that the Commission's determination, factually supported and otherwise reasonable, should have prevailed.

By standing on *WEFM*, the court of appeals interpreted the "public interest" standard of Section 310 (d) and the "larger and more effective use" language of Section 303(g) of the Communications Act (47 U.S.C. §§ 303(g), 310(d)) to require artificial governmental fostering of diversity in radio program choices, despite the absence of such regulation until the court originated it almost four decades after Congress adopted the Act. Unlike the situation in *WEFM* and

[11] 506 F.2d 246, 258-62, 266-68 (D.C. Cir. 1974) (*en banc*).

earlier adjudicatory cases,[12] the court of appeals has now persisted in its views despite a full agency record of factual data and argument, including contradiction of the *WEFM* court's economic premises, and despite the agency's reasoned conclusion that the public interest in diverse programming is better served by reliance on marketplace forces in the highly competitive radio industry.

In *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [hereinafter *NCCB*], this Court disagreed with the same court of appeals, which had relied upon essentially the same statutory language.[13] This Court then decided that the Act—specifically, Section 303(g) and, implicitly, the "public interest" standard—did not compel the Commission to require divestiture of "grandfathered" newspaper-broadcast station combinations for the sake of structural diversity.[14] The court of appeals was faulted for substituting its policy judgment for that of the Commission.

The court of appeals has made the same mistake in the instant case in demanding government manipulation of program diversity, even though both courts had recognized in *NCCB* that "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds."[15] This Court held, contrary to the court of appeals, that diversity was not the preeminent

[12] *See* note 3 *supra*.

[13] *See* 436 U.S. at 790-91.

[14] *Id.* at 782, 809-11.

[15] *Id.* at 796-97, *quoting* 555 F.2d at 961.

policy under the Communications Act, and that, to achieve the best practicable service to the public, the Commission could give greater weight to policies other than diversification.[16]

The Court in *NCCB* upheld the FCC's weighing of competing public interest factors, and reaffirmed that the expert agency, not the court, was the proper forum for establishing policy. In their minority opinions in this case, three judges of the court of appeals correctly concluded that the majority's rejection of the Commission's radio format policy—in Judge Tamm's words—"violates the [Supreme Court's] mandate of *FCC* v. *National Citizens Committee for Broadcasting*." [17]

The decision of the court of appeals also conflicts with *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940), which interpreted the Communications Act to mean that

[16] *Id.* at 804-06.

[17] Dissenting opinion of Tamm, J. at 11, FCC App. 56a; opinion of Bazelon, J., concurring in vacating decision on other grounds, at 1 and n.4, FCC App. 41a.

Judges Tamm and MacKinnon stated:

> "More important than the specifics of the current debate, is the lack of deference the majority accords the Commission's assessment of market conditions. Although the majority acknowledges the expertise of the Commission to challenge the factual premises that underly the *WEFM* decision, it mounts untested assumption upon untested assumption to create a theory of regulation that may bear little resemblance to the actual functioning of the broadcast market. Only the Commission, equipped with investigatory tools and a well of experience, may predict in the first instance the behavior of listeners and broadcasters. The majority has simply substituted its views for the Commission's." (Opinion of Tamm, J. at 10, FCC App. 55a.)

> "the field of broadcasting is one of free competition . . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public."

The court of appeals noted the Commission's reliance upon *Sanders Brothers* (slip op. at 13 n.16, FCC App. 11a), but failed to deal with its rationale that free competition in radio necessarily means free competition in the offering of programs, as this Court recognized in the above-quoted language.[18] The court's reading of Section 303(g) to require government intervention into programming decisions to obtain an artificial diversity thus conflicts with the free market intent of Congress recognized in *Sanders Brothers* and other cases, and with other provisions of the Communications Act.[19]

[18] In *WEFM*, 506 F.2d at 267, the court of appeals seemed to suggest that *Sanders Brothers* had been undermined by the "more recently" decided case of National Broadcasting Co. v. United States, 319 U.S. 190 (1943), which included this Court's statement that the FCC had a mandate "to secure the maximum benefits of radio to all the people of the United States." *Id.* at 217. We do not understand how that language or anything else in *NBC* could be construed to modify this Court's statement in *Sanders Brothers* about free competition in programming. *NBC* upheld FCC rules designed to promote rather than restrict the free choice of programs by radio stations. More recently still, this Court has recognized "the policy of the Act to preserve editorial control of programming in the licensee . . . ." FCC v. Midwest Video Corp., 99 S. Ct. 1435, 1444 (1979); *accord*, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 110, 124-25 (1973).

[19] The statutory directive of Section 303(g) to "generally encourage the larger and more effective use of radio in the public interest" does not attempt to describe specifically what that "use"

The refusal of the court of appeals to credit the Commission's theory of marketplace competition under the Communications Act magnifies the already large importance of this case because the agency has more recently proposed rulemaking to deregulate radio programming in other respects that arguably would be in-

should be, how it should be attained, or even how it relates to the "public interest." The legislative history of that provision does not expand upon the words themselves. However, the history of another portion of Section 303 is pertinent. Under subsection (b) the Commission was given the power to "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class" (47 U.S.C. § 303(b)), but it was made clear that this power did *not* encompass the power "to establish the priorities as to subject matter" to be observed by each class of licensed stations and each station within any class. *See* Hearings on H.R. 5589 Before the House Committee on the Merchant Marine and Fisheries, 69th Cong., 1st Sess. 39 (1926) (Statement by Congressman White, co-author of the Radio Act of 1927, from which the Communications Act is derived.) Such authority was withheld on the ground that its exercise would be "akin to censorship." *Id.* Another provision, now Section 326 of the Communications Act, 47 U.S.C. § 326, specifically bars censorship.

Also to the contrary of the directive of the court of appeals in this case, Section 310(d) of the Act, 47 U.S.C. § 310(d), prohibits program comparisons between a buyer and a seller, as well as between a buyer and other possible buyers. The statutory language and the legislative history of the 1952 amendments to the Communications Act demonstrate that Congress prohibited all types of comparisons in license transfer and assignment proceedings because the buyer is to be treated as an applicant for a new station under Section 308 of the Act, 47 U.S.C. § 308. *See* Brief for NAB in the court below at 8-16, discussing, *inter alia*, 98 Cong. Rec. 7394, 7397, 9022, 9033 (1952); Hearings on S. 1973 before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 35 (1949); Hearings on S. 658 before the House Committee on Interstate and Foreign Commerce, 82d Cong., 1st Sess. 73, 96-97 (1951); S. Rep. No. 44, 82d Cong., 2d Sess. 12 (1952). The court of appeals mischaracterized this argument and refused to consider it even though it had been presented extensively to both the court and the Commission. Slip op. at 28-29 n.37, FCC App. 26a-27a.

consistent with the rationale of the court of appeals. *Deregulation of Radio,* 44 Fed. Reg. 57636 (1979). Moreover, since the licensing decisions affected by the court's policy can only be appealed to the United States Court of Appeals for the District of Columbia Circuit under Section 402(b) of the Communications Act, 47 U.S.C. § 402(b), no other court of appeals will be able to consider the issues in this case, and thus there is no possibility of a conflict in the circuits that could generate further review by this Court. The rulemaking nature of this case, as well as its broad present and future implications for the formulation of communications policy, dictates that review by this Court occur now.

As with most rulemaking decisions, balancing the factors involved in format regulation requires predictive judgments, based on assumptions concerning future actions of those affected. Such predictive judgments have been considered the province of the expert agency. *NCCB,* 436 U.S. at 813-14; *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 29 (1961). Predicting and obtaining program diversity require sensitive judgments about the effects of future developments on licensee behavior and listener habits. The Commission here predicted that diversity could best be obtained by not regulating changes in formats. Absent compelling evidence to the contrary, its judgment should have been respected by the court of appeals.

The Commission relied in part on radio market studies submitted by its staff and by broadcasters responding to the Notice of Inquiry.[20] These studies

[20] The court refused to give weight to an FCC staff study of radio diversity because of the Commission's failure to release it for comment prior to decision. In fact, the FCC study merely confirmed,

showed that broad diversity in formats already exists in the major markets, and that the court's belief that radio advertisers direct their purchases of commercial air-time exclusively towards majoritorian and youth-oriented programming is erroneous. In addition, the studies showed that the *intensity* of demand for formats varies widely, so that greater public satisfaction may be arrived at through the broadcast of two similar program formats rather than two distinctly different formats.[21]

The court of appeals rejected these conclusions and reiterated the "findings" that supported its *WEFM* decision. Although survey data demonstrated that public desire for alternatives within formats was often stronger than desire for "unique" formats, the court found that "common sense" dictated the opposite result. Slip op. at 39, FCC App. 37a.[22] Thus, while attempting to cast doubt upon the FCC's findings, the court refused even to consider serious objections raised to the presumptions it had employed in the earlier format cases.

In rejecting the Commission's data and policy analysis, the court of appeals has independently determined what FCC policy should be, regardless of whether the agency concurs or whether experience supports the court's perceptions. As this Court has repeatedly held, however, it is a fundamental principle of administrative law that the responsibility for determining regulatory policy lies with the agency, not with a reviewing court, particularly in defining a term as broad as the "public interest." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). Although phrased in terms of a decision on the "law", the court's policy requires an intrusion into licensee decisionmaking far beyond anything previously forced upon the Commission. The

on the basis of data largely obtained from trade publications, the conclusions reached from similar studies publicly filed by several broadcaster parties. No party, either before or after the Commission's decision, has challenged the accuracy of this data, and the court of appeals did not rest its decision on the FCC's failure to seek public comment thereon. Slip op. at 19 n.24, FCC App. 17a.

[21] A study by economist Bruce Owen (presently Director, Economic Policy Office, Antitrust Division, Department of Justice) demonstrated that differing levels of intensity of demand for formats made the use of a simplistic "uniqueness" standard ineffective in maximizing consumer satisfaction. Professor Owen concluded that operation of the existing market satisfied demand as well or better than any system of regulation. This NAB-commissioned study, which was available to all parties, was relied on by the Commission, 60 F.C.C.2d at 863-64, FCC App. 129a-30a, and by the dissenters in the court of appeals. Opinion of Tamm, J. at 7-8 n.14, FCC App. 52a-53a. It was ignored by the majority.

[22] In an attempt to show that the market did not function as the Commission had concluded, the court twice stated that opinion surveys indicated that 16% of the listeners in Atlanta had preferred classical music, even though the licensee had attempted to abandon the format. Slip op. at 8 n.7, 38 n.52, FCC App. 6a, 36a. To the contrary, as was pointed out to the court, the Atlanta study showed only that 16% of the sampled listeners preferred classical music to the particular alternative format proposed by the station buyer in Atlanta. The court wholly ignored the likelihood that classical music was the second, third or lower-level overall preference of many of those who favored it in the context of a limited choice. The hearing record in *WEFM* further shows the unreliability of the court's assumptions. In *WEFM*, the court relied on a survey which found that 18% of the public desired classical music. 506 F.2d at 264 n.25. Yet out of a metropolitan area population of 5,000,000, ratings data introduced at the hearing showed that the three stations which featured classical music had a total audience of fewer than 20,000 persons. The court did not address this disparity. Were 16% or 18% of the listeners in a large metropolitan area actually listening to a station, that station would not only lack incentive to change its format, it likely would be the most listened-to station in the market.

court has usurped the agency's role, as it did only to be reversed by this Court in *NCCB* and *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94 (1973) [hereinafter *CBS*].

II.

The decision of the court of appeals violates the First Amendment to the Constitution, as well as the no-censorship prohibition of Section 326 of the Communications Act, 47 U.S.C. § 326. The court's interpretation means that a station's basic format—be it classical music, contemporary music, news or some other specialty programming—will be determined by the Commission after an evidentiary hearing if listener protest and the other circumstances posited by the court are present. If the Commission rules against presentation of the proposed format, the resulting prior restraint of protected speech would be both direct and complete. Such a far-reaching power of program censorship—without any objective standard for choice between two formats—cannot be reconciled with the First Amendment and Section 326.[23]

The program format having the most obvious journalistic value is the all-news format. The possibility of government prohibition of a radio station's change to

[23] *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553-54 (1975).

The court of appeals has attempted to establish the "narrowness" of its decision by making the astonishing statement that the Commission "has no authority under *WEFM* to interfere with licensee program choices: it cannot restrain the broadcasting of any program, . . . [or] force retention of an existing format. . . ." Slip op. at 27-28, FCC App. 25a-26a. This disclaimer is in direct conflict with the court's instructions to the FCC throughout the opinion.

an all-news format presents a striking First Amendment question. But there are also important free-speech values in non-news program elements, for example, "talk" (including studio and telephone interviews), music lyrics, program continuity and commercial advertising.[24] It is notable that the broadcaster's journalistic discretion and "editing" function given protection in the *CBS* case did not directly involve news and public affairs departments, but rather, sales and managerial departments which refused to sell commercial advertising time for the presentation of public-issue announcements. The interrelationships and unity of broadcast operations as essentially journalistic in character were implicitly recognized in Chief Justice Burger's opinion.

The *CBS* opinion also explained how our commercial broadcast system is based upon a "historic aversion to censorship." [25] The Court emphasized that traditional First Amendment freedoms were written into the Communications Act.[26]

Regardless of whether a format change is ultimately permitted after an evidentiary hearing, the Commission's subjective value judgments, made under the

[24] "What is one man's amusement, teaches another's doctrine." Winters v. New York, 333 U.S. 507, 510 (1948). In recent years, the Court has given additional protection to product advertising. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976), and cases cited therein.

[25] 412 U.S. at 116.

[26] "Many of those policies [of the 'public interest' standard of the Act], as the legislative history makes clear, were drawn from the First Amendment itself; the 'public interest' standard necessarily invites reference to First Amendment principles." 412 U.S. at 122.

court's policy requiring a choice between program formats, would violate the First Amendment and Section 326.[27] There is no way that the Commission can avoid making subjective judgments about whether one or another format better serves the public interest. Considering the inherent lack of standards for choosing between program formats once the public interest in both is shown,[28] the potential for agency decision-making on the basis of the personal tastes and cultural biases of individual commissioners is great.

The mere threat of later government compulsion to retain a format, thus "locking in" the broadcaster, is seriously inhibitive to any broadcaster considering the adoption of a format that is unique or that might subsequently become unique in the marketplace. Innovative programming is thus deterred. Similarly inhibiting and productive of self-censorship is the possibility of a protracted and costly evidentiary hearing before a decision on whether to permit any change from a "unique" format. Self-censorship takes the form of either (1) a foregone opportunity to change a program format because of the threat or fear of litigation, or (2) a program settlement under duress from a special-interest listeners group that has petitioned to deny a license renewal or transfer application involving a format change.[29]

[27] *Cf.* National Ass'n of Independent Television Producers and Distributors v. FCC, 516 F.2d 526, 539-41 (2d Cir. 1975).

[28] *See* FCC v. Pacifica Foundation, 438 U.S. 726, 761 (1978) (Powell, J., concurring).

[29] The court of appeals cited such settlements approvingly because they resolve the issue without a hearing that is administratively burdensome to the FCC. Slip op. at 20-22, FCC App. 18a-20a. However, the essential point is that in a settlement—usually an agreement to continue the old program format in some form—the licensee is not making a free choice under marketplace competition that serves all listeners in the community.

This government-induced self-censorship by broadcasters curbs the exercise of First Amendment rights to the detriment of the public as well as broadcasters.[30] In its decision, the Commission found that the prospects of inhibiting experimentation were real and "of great importance." [31] In these circumstances, the inhibiting regulation of program formats would be constitutionally defensible only upon the showing of a subordinating interest which is compelling.[32]

Far from establishing a compelling reason for such regulation, the Commission found that the need for greater diversity in radio program formats in each market is dubious at best. "To sacrifice First Amendment protections for so speculative a gain is not warranted . . . ." [33] Thus, in addition to the unconstitutionality of the direct prior restraint discussed above, broadcasters' self-censorship necessarily resulting from the FCC's role in format choice would clearly violate the First Amendment.

Three judges of the court of appeals, like the Commission, thought that court-ordered format regulation created substantial First Amendment concerns.[34] The

[30] *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

[31] 60 F.C.C.2d at 865, FCC App. 132a-33a.

[32] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); NAACP v. Button, 371 U.S. 415, 439 (1963).

[33] *CBS*, 412 U.S. at 127; *see also* Buckley v. Valeo, 424 U.S. 1, 44-45 (1976).

[34] Opinion of Tamm, J., at 3 n.8, FCC App. 48a; Opinion of Bazelon, J., at 2-3, FCC App. 42a-43a.

majority of the court likened format regulation to the judicially approved fairness doctrine,[35] conceding in order to make their point, that both forms of program regulation "involve the Commission in an area charged with sensitive First Amendment implications."[36] However, there are obvious and significant distinctions between the broad discretion given to broadcasters under the statutory fairness doctrine[37] (and other forms of limited and non-prohibitory FCC program regulation), on the one hand, and this court-initiated format prohibition and prescription, on the other.

No court has ever required or permitted the FCC to determine the general substance of a broadcaster's overall programming (other than the court of appeals in its program format cases). Indeed, no court has successfully required the FCC to intrude into *any* form of program regulation which the agency opposed.[38] That is the proper judicial deference to the Commission's interpretation of its authorizing statute, informed by a purpose to avoid abridgement of the First Amendment rights of broadcasters.

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[35] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

[36] Slip op. at 33, FCC App. 31a.

[37] "[I]t contemplates a wide range of licensee discretion." FCC v. Midwest Video Corp., 99 S. Ct. 1435, 1444 n.14 (1979).

[38] *Cf.* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom.* Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973). *Compare* Public Interest Research Group v. FCC, 522 F.2d 1060, 1067 (1st Cir. 1975) (". . . we have doubts as to the wisdom of mandating, rather than merely allowing, governmental intervention in the programming and advertising decisions of private broadcasters").

CONCLUSION

The court of appeals has disregarded the limits of judicial review by its unprecedented compulsion of FCC control over artistic and news programming. The regulation in question, which involves program censorship by the FCC and government-induced self-censorship by broadcasters, violates the First Amendment to the Constitution and Section 326 of the Communications Act. Therefore, review by this Court is required, and this petition for a writ of certiorari should be granted.

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STATUTORY APPENDIX

Section 303 of the Communications Act, 47 U.S.C. § 303:

Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

• • •

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

• • •

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

• • • •

Section 308 of the Communications Act, 47 U.S.C. § 308:

Requirements for license

(a) *Writing; exceptions*

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it:

• • •

(b) *Conditions*

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location

of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee.

• • • •

Section 310 of the Communications Act, 47 U.S.C. § 310:

• • •

(d) *Assignment and transfer of construction permit or station license*

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

Section 326 of the Communications Act, 47 U.S.C. § 326:

Censorship

Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.